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ABSTRACT

This monograph traces the recent legal developments on newsmen's privilege (to keep sources of information confidential) and attempts to synthesize the status of newsmen's privilege in 1974. Some of the current arguments for and against a journalist's privilege are reviewed in regard to both consitutional and statutory approaches to it. And this monograph also reports on a pilot survey of the attitudes of selected law enforcement personnel, which showed decidedly mixed opinions toward the complex issue of newsmen's privilege, and whether and how it should be implemented. (TS)

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NEWSMAN'S PRIVILEGE AND THE LAW

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TABLE OF CONTENTS

		PAGE
	Introduction	1
I.	Background	2
II.	Recent Privilege Cases	13
III.	A Pilot Survey	25
IV.	Conclusions	44
	Selected Bibliography	50

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INTRODUCTION

Since the June, 1972, Supreme Court opinions in Branzburg v. Hayes (408 U.S. 665), varying interpretations of this newsman's privilege decision have been put forth. Some, particularly in the first months after the opinion was handed down, viewed it as portending a complete lack of First Amendment protection for the confidentiality of newsmen's sources and/or information. Others viewed the decision as more limited in scope and as only one more link in the 125-year American legal history of newsman's privilege. Arguments for and against this privilege have continued to range over a considerable number of points, and even supporters of newsman's privilege cannot agree on the best way to safeguard what they view as an important journalistic tool, and one which contributes to the good of the total society. (Some of the variety in recent writings on this topic may be obtained from sources listed in the Selected Bibliography included at the end of this monograph.)

Since the Branzburg decision, the newsman's privilege issue has been back in the courts in at least a dozen reported cases, and in numerous unreported decisions. The rulings in these cases have at times been almost diametrically opposed -- some supporting the right of a newsman to keep confidential his sources of information, and others

ordering disclosure of confidential material. Two years after the Supreme Court ruled on the newsman's privilege issue for the first time, in Branzburg, the status of the constitutional law, and the law in general, on this topic is much less than totally clear. Even in those 25 states which have tried to safeguard journalists' confidentiality by statute (including six laws passed since the Branzburg decision), the outcome of legal proceedings to force the revelations of confidential material has been unpredictable.

Within this context, this monograph will trace the recent legal developments on newsman's privilege -- reported and unreported -- and will attempt to synthesize the somewhat equivocal status of newsman's privilege in mid-1974. It will review briefly some of the current arguments for and against a journalist's privilege, in regard to both constitutional and statutory approaches to it. And it will report on a pilot survey of the attitudes of selected law enforcement personnel, which showed decidedly mixed opinions toward the whole complex issue of newsmen's privilege, and whether and how it should be implemented.

I. BACKGROUND

The first point to keep in mind in considering this issue is that -- as usual when constitutional principles clash -- there are no easy answers. The newsman's privilege

controversy is basically a clash between the First Amendment's protection for the flow of information to the public and the Sixth Amendment's guarantee of an orderly judicial process. At the point where evidence is withheld -- including evidence which may fall within a confidential journalist-source relationship -- the smooth functioning of the judicial process will be impaired, to a greater or lesser degree. There are those who have argued that any such impairment is not justified by the benefits of confidentiality between journalist and source, under any circumstances. (For the classic argument along this line, see Wigmore, John Henry, Evidence in Trials at Common Law, 4th edition, revised by John T. McNaughton, Boston, Mass.: Little, Brown and Co., 1961, especially Volume 8, Chapter 81, Sections 2285-2286, pp. 527-537.) Alternatively, there are those who always find the balance tipping the other way. They argue that a totally protected flow of information to the public, which eventually has to make the decisions in a democracy, is always worth more than any increased efficiency in the judicial process which the disputed evidence might provide. (For an early example of this approach, although less than an absolutist viewpoint, see Siebert, Fredrick S., "Professional Secrecy and the Journalist," Journalism Quarterly, Winter, 1959, pp. 3-11.)

Increasingly, in the past decade, there are many

observers whose positions fall between these two extremes. One problem facing these people is to strike a proper balance by defining the exact point at which society's interest in the unfettered flow of information begins to outweigh society's interest in the most efficient possible functioning of the judicial system. The second half of the equation is to come up with some usable formula through which this point can be specified, under differing sets of circumstances.

Originally, the flow of confidential material frequently involved allegations of official corruption. (See, for example, ex parte Lawrence, 48 Pac. 124, 1897; in re: Grunow, 85 A. 1011. 1913; and People ex. rel. Mooney v. Sheriff of New York County, 199 N.E. 415, 1936.) More recently, and Watergate notwithstanding, many of the newsman's privilege incidents involve contacts between reporters and groups which find themselves outside the mainstream of society. The most outstanding examples of this trend are the three cases involved in the Branzburg decision; two concerned the Black Panthers, and the third involved the drug culture. If society as a whole is to be kept informed of what such groups are thinking, or doing, or thinking of doing, recent experience seems to indicate that a confidential relationship between the groups and news people will often be necessary. Thus, as one authority has put it, the confidentiality problem is more likely to

involve a relatively small number of stories, but ones which are of extremely high value to society. The Branzburg opinion, he said,

> ...could have the unfortunate effect of regarding what is probably the most important journalistic development of recent times--the trend toward a more thoughtful, interpretive style reporting.... When the newsman's autonomy is compromised by the possibility that he might be subpoenaed, an element of self-consciousness and caution can intrude into the relationship and this may foreclose the possibility of truly perceptive reporting. (Blasi, Vince, "The Justice & the Journalist," The Nation, Sept. 18, 1972, p. 198.)

On the other side of the bar, the well-recognized citizen's duty to give testimony (see Wigmore, op. cit., Chapter 76, Section 2192, pp. 70-74; see also Blair v. United States, 250 U.S. 273 at 281, 1919; and Blackmer v. United States, 284 U.S. 421 at 438, 1932) is not an absolute. Most pertinently, the Fifth Amendment punches gaping holes in the ideal of smooth and efficient judicial machinery oiled by the public's right to "every man's evidence," through its exclusion of even highly relevant testimony in favor of a higher social good than judicial efficiency. But there are also numerous other privileges which exclude testimony under various conditions -- those, for instance, which prevent spouses from testifying against each other, which safeguard communications between lawyer and client or physician and patient, and which often safeguard the identity of police informers. Thus, one must return to the need to strike a balance between the

requirements of the judicial system and the informational needs of a democratic society.

Generalized formulas for striking a balance between two such complex processes will always run the risk of becoming unworkable because of unforeseen specifics in either process. For example, if one were to specify that only "important" information will be safeguarded by confidentiality, the general formula would fall victim to changes in society's definitions of importance, as well as giving censorial power to judges in specific cases. This is one of the drawbacks in trying to provide this kind of protection in statutory form -- definitions and situations keep changing, and lawmakers are seldom able to outguess the human capacity for devising factual situations not covered directly by statutory language. Thus, in the William Farr case, one issue was whether Farr, a former reporter at the time he was ordered to reveal his confidential sources, was covered by the language of the California newsman's privilege statute. The courts ruled that he was not, a decision which led to the later amendment of the law to provide explicit coverage for former newsmen. The decision also produced the ironic effect of Farr as a reporter writing his story based on confidential sources, then being ordered to reveal those sources after having temporarily left the newspaper field, and going to jail for his refusal after having returned to newspaper

work and after the state law had been amended.

Several basic distinctions must be noted, in trying to define the scope of the newsman's privilege issue. One is between confidential sources and confidential information. Until the late 1960s, the stress in newsman's privilege cases was almost always on the identity of confidential sources. But in the last six years or so -- perhaps most especially since law enforcement agencies began to realize in the wake of the 1968 Democratic National Convention that newsmen were in fact experienced and reliable observers of the society and its behavior -- the emphasis has shifted about evenly to information which has been procured with a promise to keep it confidential. For example, Earl Caldwell and Paul Pappas, the two reporters who covered the Black Panthers in cases which came to the Supreme Court in 1972, were both asked for confidential information by the grand juries which subpoenaed them. By contrast, Paul Branzburg, the reporter who had covered the drug culture, was asked to identify his confidential sources. One of the earliest cases illustrating both the switch from sources to information, and protection for newsmen, was People v. Dohrn, et al. (No. 69-3808 Cook County Circuit, 1970). In that unreported case, growing out of Weathermen disturbances in Chicago, subpoenas issued to newsmen were quashed and guidelines set forth to insure that future subpoenas would be issued only to prevent a miscarriage of

justice, and when no other method is available to obtain the required evidence. Those guidelines have generally been followed in Illinois courts since 1970, despite the fact that the Dohrn decision never made it into the law reports.

A second important distinction is between cases which have been included in the various law reports, and the unreported cases. Most cases in the law reports have resulted in decisions against newsman's privilege. Among unreported cases, the majority have refused to allow privilege, but -- as illustrated by the Dohrn decision -- there have been many more rulings favorable to newsman's privilege than in the reported decisions. This is especially true in the last several years. Thus, in determining the present status of the law on newsman's privilege, both kinds of decisions must be kept in mind: the reported cases because they are usually used as precedent, and the unreported cases because they provide a further indication of how this issue is being decided on the judicial firing lines.

Finally, there is a three-way distinction in the methods by which protection may be provided for newsmen's confidential sources or information: common law, constitutional protection, and shield statutes. The oldest method, and one which has been invoked by newsmen with a uniform lack of success, is via common or judge-made law. In cases stretching back to 1848 (see Nugent v. Beale, 18

Fed. Cas. 471, 1848), American newsmen have tried to convince judges to rule in their favor on this issue, based on parallels drawn unsuccessfully to the various other evidentiary privileges allowed by common law. Among such privileges are those between spouses, attorney and client, physician-patient, clergyman-penitent, and for police informers. Since 1958, however, this common law claim has either been missing from newsmen's legal arguments or has assumed a distinctly secondary role to the constitutional claim of protection under the First Amendment.

That constitutional claim emerged for the first time in 1958, in Garland v. Torre (259 F. 2d 545), along with the common law argument. The decision in that case went against Marie Torre, and in language which was construed in subsequent years, in retrospect apparently in error, as being an absolute bar to newsmen's privilege under the First Amendment. What the Circuit Court of Appeals actually did in Torre was to weigh the reporter's claim for constitutional protection against the need for her testimony to insure fairness in that specific judicial proceeding.

> What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. (259 F. 2d 545, at 548. Emphasis added.)

In the opinion by then-Judge Potter Stewart, the court

concluded that the balance in this instance was on the side of disclosure.

> It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality.... The question asked of the appellant went to the heart of the plaintiff's claim. We hold that the Constitution conferred no right to refuse an answer. (259 F. 2d 545, at 549-550.)

Nonetheless, the Torre decision was cited five times in the next 11 years as precedent for denying First Amendment protection for every newsman's privilege claim. The first time this happened illustrates how differences between situations were overlooked. In Torre, the testimony of an entertainment columnist was required in order to allow a libel and breach of contract suit to be carried forward. Without the reporter's testimony, the suit eventually was dropped. (See The New York Times, June 29, 1966, p. 23.) But in the second case (Appeal of Goodfader, 367 P. 2d 472, 1961), the Hawaii Supreme Court acknowledged that other sources of information might be available, but still ordered a municipal government reporter to reveal his confidential sources of information, apparently because of a belief that the First Amendment conferred no privilege to protect that source, under any circumstances.

In both the Torre and Goodfader cases, the reporter

was involved only as a third party, in cases directly concerning others. This has been typical of newsmen's privilege cases, and only in rare instances have journalists been directly involved. Far more often, their testimony has been sought to benefit one side or the other in cases where the newsman has no direct interest.

The Torre case was the first of three unsuccessful attempts to get the U.S. Supreme Court to review a newsman's privilege decision. Others included Murphy v. Colorado (cert. den., 365 U.S. 843, 1960), an oral opinion by the Colorado Supreme Court in a disbarment proceeding which eventually was decided against the lawyer, even without the reporter's allegedly damaging information; and State v. Buchanan (436 P. 2d 729, cert. den., 392 U.S. 905, 1968), a grand jury investigation of alleged marijuana use on the University of Oregon campus, in the wake of stories in the campus newspaper. In the Torre and Murphy cases, Justice Douglas dissented from the refusal to grant certiorari, but in Buchanan, no dissents were recorded from the Court's refusal to hear the case. It was not until 1971, when three lower court cases produced differing results, that the Supreme Court agreed to take up the subject of newsman's privilege.

Those three cases included one which illustrates the third method for protecting newsman's confidential material -- via statutes. This method was first used in Maryland, in

1896, and seven more states enacted so-called shield statutes in the 1930s, some as a result of a wave of cases attempting to force disclosure of confidential sources under a variety of circumstances. Some of those circumstances were almost frivolous in nature, for example the Kentucky police court which repeatedly sentenced two reporters to fines and brief jail terms over a two-week period in 1934 for their refusal to identify a tipster who told them about a state legislator's upcoming hanging in effigy. Four more states passed privilege statutes in both the 1940s and the 1960s, while eight have passed shield legislation so far in the 1970s. In addition, federal legislation has been proposed repeatedly since 1929, and in the 93rd Congress alone, nearly 100 different federal shield proposals were introduced, many of them apparently in response to the Branzburg decision. But, like shield proposals in a number of states, the federal proposals have yet to be enacted into law.

The 25 states with shield legislation have widely varying laws on their books. Most of the earlier statutes dealt only with confidential sources of information, while some of those in the last 10 years have also attempted to cover unpublished confidential information. The scope of the coverage also varies widely, from "reporters of newspapers or other publications" (Michigan Compiled Laws, 767.5A, 1949) to people "engaged in, ...connected with or

employed by" newspapers and/or other news media, sometimes without any further definition of what qualifies as a news medium. (See, for instance, Tennessee Code Annotated, Section 24-113, 1973 Cumulative Supplement.) Similarly, the bodies before which the privilege may be invoked vary from state to state, as do the crucial questions of waiver of the privilege, and exceptions to it which can lead to divestiture. Most of the recent laws provide for a less-than-absolute privilege, with the exceptions covering libel cases to which the news medium is a party; situations where the reporter's testimony is deemed by a court to be essential to prevent a miscarriage of justice; and perhaps most frequently, situations where there is an "overriding public interest" in disclosure, frequently in situations where the information may relate to a probable violation of the law and/or is unavailable from any alternative source. (For a concise but thorough examination of the varying provisions of state shield legislation, see Shield Laws. Lexington, Ky.: The Council of State Governments, 1973, pp. 10-19.)

II. RECENT PRIVILEGE CASES

Even in states with broad shield statutes, newsmen cannot be sure their confidentiality will be protected. Four recent newsman's privilege cases have resulted in the jailing or threatened imprisonment of reporters, despite

state shield laws which seemed to protect the journalists. In Maryland, David Lightman was ordered to tell a grand jury about an alleged proffering of marijuana by a clerk in an Ocean City "head shop," despite the state's shield law protecting confidentiality of sources. The court held that Lightman's personal observation of the alleged illegal action, in a customer's role, voided the statutory protection because neither the clerk's identity nor the shop's location constituted a reporter's confidential source of information. Rather, in these circumstances, the newsman himself was the statutory "source" of the information, the court held. (Lightman v. State, 294 A. 2d 149, cert. den., 411 U.S. 951, 1973, with Justice Douglas voting to grant certiorari.) Lightman eventually told the grand jury the location of the shop, but not the clerk's name, and avoided a jail term. (See The New York Times, June 13, 1973, p. 30.)

Similarly, in New Jersey, Peter Bridge was ordered to give a grand jury unpublished details of his interview with a Newark housing commissioner whom he had quoted as claiming she was offered a bribe. The state courts held, in line with narrow interpretations of the New Jersey shield law going back some 30 years, that Bridge had waived the privilege by disclosing his source of information, and some of the information itself. Bridge refused to answer the questions and spent 20 days in jail; the grand jury

returned no indictments in the case and commented that it had "...serious reservations as to whether such a bribe attempt was ever made," despite Bridge's story in the Newark Evening News. (See The New York Times, Oct. 25, 1972, p. 1; and in re Bridge, 295 A. 2d, 3, 1972, cert. den., 410 U.S. 991, 1973.)

In California, in a case noted earlier, William Farr repeatedly refused to name the confidential source who supplied him with an alleged confession which he published in 1970, during the Charles Manson murder trial. The story ran despite an order by the trial judge restricting news releases by anyone connected with the case. In disciplinary proceedings begun after Farr left the Los Angeles Herald Examiner to work for the district attorney, the reporter told the judge that at least two of the six attorneys in the case gave him the information but relied on the state's shield statute in refusing to identify them further. The state courts ruled that the shield statute probably did not cover a former newsman like Farr and would not apply in any event when a court was attempting to enforce its control over its own officers. Allowing the legislative concern with protecting confidentiality would infringe on the courts' responsibilities and violate the separation of powers principle, the court ruled. (Farr v. Superior Court, County of Los Angeles, 99 Cal. Rptr. 342, 1971, cert. den., 409 U.S. 1011, 1972, with Justice

Douglas again dissenting.)

Farr, by then a Los Angeles Times reporter, spent 46 days in jail for contempt of court, for his refusal to identify his sources. He was finally released on a habeas corpus appeal to Justice Douglas, pending disposition of his various appeals. (Farr v. Pitchess, 409 U.S. 1243, 1973, opinion by Justice Douglas in chambers, acting as Circuit Justice for the Ninth Circuit. This opinion noted that the case involved substantial unresolved questions, including the effect of the California shield law, and concluded that it was unfair to imprison Farr while these questions were being considered.) In an apparent effort to resolve the stalemate and still uphold the courts' disciplinary powers, the California Court of Appeal in early 1974 held that at some point, Farr's imprisonment would become punitive rather than being likely to force disclosure of the newsman's sources. At that point, the court said, California law limits the prison term to five days. Therefore, Farr was directed to return to the trial court, and in effect convince it that his refusal to testify was based on principle which would not be overcome by further time in jail. (in re Farr, 111 Cal. Rptr. 649, 1974.) Farr succeeded in convincing the judge who was given jurisdiction of the case that, because "...of his commitment to the principle of confidentiality and to the promises he has made, there is no substantial likelihood

that further incarceration of Farr will result in his compliance with the court's order to reveal the identity of his sources or otherwise serve the purposes of the order." (Bloomington, Ill., Daily Pantagraph, June 20, 1974, p. A-1.) Thus, because the penalty would be punitive rather than coercive in nature, Farr's further punishment was limited to five days in jail and a $500 fine on each contempt count. (Note that although all attorneys in the case testified earlier they had not been Farr's sources, two of them were indicted for perjury in mid-1974 by a Los Angeles County grand jury, in connection with that testimony. San Francisco Chronicle, July 3, 1974, p. 4.)

The fourth newsman facing jail despite a state shield law was Paul Branzburg, who gave his name to the 1972 Supreme Court privilege decision. In his refusal to identify for two grand juries his sources for stories about the drug culture around Louisville, the Courier-Journal reporter relied heavily on the Kentucky shield law, which seemed to provide absolute protection for confidential sources. But the Kentucky high court, in a split decision, held that the law didn't apply when a reporter had witnessed a crime, and Branzburg was therefore unable to assert confidentiality even though he witnessed the making of hashish only because of his confidential relationship with the hashish makers. (Branzburg v. Pound, 461 S.W. 2d 345, 1971.)

The other two cases which were subsumed in the 1972 Supreme Court decision involved reporters who covered the Black Panthers at opposite ends of the country. The lower court decisions in these two cases went in opposite ways, and in one, the reporter was granted not just a privilege for confidential material but also a limited right not to appear at all before a grand jury. Earl Caldwell, a New York Times reporter covering the Panthers in San Francisco, won a limited privilege not to reveal unpublished confidential information, in federal District Court. (Application of Caldwell, 311 F. Supp. 358, 1970.) But arguing that this privilege did him no good if he still had to appear at a closed grand jury session, where his sources could never be sure what happened, Caldwell appealed and, to the surprise of many observers, won the right to avoid a grand jury appearance altogether, for this specific situation where he had been granted a limited testimonial privilege. (Caldwell v. United States, 434 F. 2d 1081, 1970.)

In the second case involving coverage of the Panthers, the Massachusetts high court held that there was no protection for a television newsman who had been admitted to the group's headquarters in New Bedford, Massachusetts, on the express condition that he would report nothing unless an expected police raid materialized. The raid never took place, and Paul Pappas argued unsuccessfully

that he was bound to protect the confidentiality of what took place inside the headquarters, in order to maintain his relationship of trust with the local Panther organization. (In re Pappas, 266 N.E. 2d 297, 1970.)

At the Supreme Court level, Justice Byron White extended some First Amendment protection to newsgathering, the first time this activity had been so recognized. But he went on to hold that newsmen have no First Amendment right not to testify before a grand jury, just as other citizens must do.

> Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on newsgathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation of criminal trial. (408 U.S. 665, at 690-691.)

Justice White added that legislatures could remedy the situation through passage of either state or federal shield legislation, if they desired. But in the absence of such statutory protection, "...there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good faith grand jury investigation." (408 U.S. 665, at 708.) In a brief concurring opinion, Justice Powell stressed that the decision was

indeed limited to legitimate grand jury probes and that "...no harassment of newsmen will be tolerated." He called for "...a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct," and added that "...where legitimate First Amendment interests require protection," the courts will protect newsmen. (408 U.S. 665 at 710.) Yet, in the Lightman case, where harassment was argued by the newsman (St. Louis Post-Dispatch, April 23, 1973, p. 2A), no one on the Supreme Court went on record in favor of reviewing the case.

Four justices dissented in Branzburg, led by the unusually strong words of Justice Stewart that "The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society." (408 U.S. 665, at 725.) But this position remains a minority viewpoint on newsman's privilege and the First Amendment, albeit not an inconsequential one.

The Lightman and Bridge cases noted above were both decided following Branzburg, and the various Farr decisions have overlapped it. Other post-Branzburg decisions which ruled against a newsman's right to confidentiality include People by Fischer v. Dan (342 N.Y.S. 2d 731, 1973); U.S. v. Liddy (354 F. Supp. 208, 1972); and Dow Jones & Co., Inc. v. Superior Court

(303 N.E. 2d 847, 1973). In unreported actions, a television newsman in Vermont and a newswoman in St. Petersburg, Florida, were ordered to reveal their sources or face contempt sentences. (See The New York Times, July 26, 1973, p. 31; November 3, 1973, p. 7, and December 22, 1973, p. 26; St. Louis Post-Dispatch, November 2, 1973, p. 7A, and May 24, 1974, p. 7A; and The Quill, March, 1974, p. 11.)

But in a half dozen reported decisions and at least that many unreported incidents since Branzburg, newsmen have been allowed to protect confidential sources or information, in some cases with direct reference by the courts to the Branzburg opinion. For example, in Democratic National Committee v. McCord, et al. (356 F. Supp. 1394, 1973) a civil suit growing out of Watergate, ten reporters succeeded in quashing subpoenas requiring them to reveal confidential information about the break-in, on the grounds that alternative sources of information had not been exhausted, and because it had not been established that the confidential material went to the heart of the issues, as in the Torre case. The court said it found this specific protection for confidentiality to be consistent with the Branzburg holding, particularly since this was not a criminal case, and its importance "...transcends anything yet encountered in the annals of American judicial history." (356 F. Supp. 1394, at 1397.)

Similarly, lack of centrality to the case protected confidential material sought from reporters in three other civil cases, including one (Cervantes v. Time, Inc., 330 F. Supp. 936, 464 F. 2d 986, cert. den., 409 U.S. 1125, 1972) in which the news medium itself was being sued for libel. (By contrast, in the Dow Jones case noted above, where confidentiality was denied, the medium was also a libel suit defendant, but the material sought was much more crucial to the case.) The other two were Forest Hills Utility Co. v. Heath (302 N.E. 2d 593, 1973), in which confidential information not relevant to the suit was protected under general Ohio court procedures; and Baker v. F. & F. Investment (339 F. Supp. 942, 470 F. 2d 778, 1972) where the lower federal courts held that disclosure of the real name of a realtor, who had co-authored a magazine article on block-busting under a pseudonym, was not important enough to warrant infringement of the First Amendment rights specified by Branzburg. The Supreme Court declined to review the case (cert. den., 411 U.S. 966, 1973), thus leaving standing a precedent granting newsman's privilege at the Circuit Court of Appeals level, in civil cases. In fact, the decision in Baker specifically called the Branzburg holding a "limited principle," which applied to newsmen appearing before a grand jury conducting a criminal investigation. (470 F. 2d 778, at 779-780.)

But even in criminal proceedings, rulings on confidentiality have sometimes protected the newsman, even in the wake of Branzburg. Two reporters on a Black Panther newspaper were allowed to refuse to give a federal grand jury confidential information about the internal management of the paper, though not before they spent some time in jail after the trial court ruled against them. The appeals court held that the desired information was not relevant enough to the grand jury's investigation to allow a chilling incursion on First Amendment rights. (Bursey v. United States, 466 F. 2d 1059, 1972, reversing in re Grand Jury Witnesses, 322 F. Supp. 573, 1970.)

In a Delaware case (in re McGowan, 303 A. 2d 645, 1973), the state's Supreme Court held that the Wilmington News-Journal did not have to provide state police with unpublished negatives taken at an anti-busing rally. The decision, however, was based on the technicality that the subpoena in the case was improper and could not validly be used to assist a routine police investigation. A proper subpoena by the state attorney general, however, would be subject to the Branzburg standards and guidelines, the court held. (303 A. 2d 645, at 648.)

Among the unreported instances where newsmen have been granted at least a limited privilege of confidentiality since Branzburg are cases involving a Virginia newswoman (St. Louis Post-Dispatch, April 23, 1974, p. 12B); Missouri

television newsmen (St. Louis Post-Dispatch, April 21, 1974, p. 10A, and April 27, 1974, p. 7A); a Tennessee television talk show host (The New York Times, April 28, 1973, p. 66); and newsmen in Connecticut, Georgia and Florida (The New York Times, March 21, 1973, p. 19; May 20, 1973, p. 20; and June 10, 1973, p. 23). The cases, all involving newsmen as third parties, ranged from murder trials to grand jury investigations of alleged corruption. The reasons for granting the privilege varied from the fact that a grand jury term had expired to a ruling that the information was not essential to a fair trial to a holding that newsmen could be forced to testify about confidential matters only if they had actually witnessed the commission of a felony.

Additionally, newsmen in a number of instances have been ordered to reveal confidential material, and their refusals have produced threats of punishment that have been left hanging over the journalists without a clear resolution. (See the list of recent developments on this topic, compiled by The Reporters Committee for Freedom of the Press and printed in Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 93rd Congress, 1st Session. Washington: U.S. Government Printing Office, 1973, pp. 752-757; hereafter cited as Senate Hearings. This listing also contains five instances where stories were

cancelled because confidentiality could not be adequately guaranteed to important sources.) Thus, two years after Branzburg, the arguments continue over whether newsmen should be privileged to protect confidential sources, and if so, to what extent.

III. A PILOT SURVEY

Opinions about shield statutes and the status of protection for newsmen's confidential material were the subjects of two surveys of law enforcement officials in the 1940s. One study, by Walter Steigleman ("Newspaper Confidence Laws--Their Extent and Provisions," Journalism Quarterly, September, 1943, pp. 230-238), surveyed the attorneys general of the 48 states and was aimed primarily at determining the status of the law. The second, reported by the New York Law Revision Commission (Report and Study Relating to Problems Involved in Conferring Upon Newspapermen a Privilege Which Would Legally Protect Them From Divulging Sources of Information Given to Them, 1949, at pp. 143-146), was directed to attorneys general and police chiefs in the 11 states which then had shield laws. This survey, by the sponsor of a New York shield bill, asked the law enforcement people "how the law worked out in their respective states and whether reporters had interfered in any way with prosecution of criminals or law enforcement." (Ibid., at p. 143; letter submitted to the NYLRC from State

Sen. Thomas C. Desmond.)

The New York survey reported that no respondent cited a single instance of a reporter even attempting to abuse the statutory privilege and noted that the group was "virtually unanimous that the laws had worked out satisfactorily and that reporters had not interfered with law enforcement or prosecution of criminals at all." (Ibid.) The study also quoted one of the respondents--an assistant attorney general in Arkansas--that the shield law there had been helpful at times to police and other law enforcement bodies. (Ibid., at p. 144.) That theme was picked up again nearly a quarter of a century later by Prof. Vince Blasi of the University of Michigan Law School, who reported that in his interviews with prosecutors, a number of them indicated some benefits to them from the existence of confidential relationships between newsmen and sources. (See Blasi's testimony reported in Senate Hearings, pp. 138-139; See also Blasi, Press Subpoenas: An Empirical and Legal Analysis, Reporters Committee for Freedom of the Press: Study Report, 1972, esp. at pp. 29-37 and 206-208.)

Another recent survey, this time of attorneys general, was undertaken by the American Newspaper Publishers Association and submitted to the 1973 hearings on proposed newsman's privilege legislation held by Congressional committees. (See Senate Hearings, pp. 721-

723.) Thirty-four responses were received; 19 of the attorneys general said they were not aware of any confrontations between investigative bodies and the press in their states; seven expressed support of varying degrees for the enactment of newsman's privilege legislation. (Additionally, a letter to the author, from John M. French, Jr., dated Feb. 25, 1974, noted two later responses to the ANPA survey, both of which indicated no subpoena confrontations, and one of which expressed support for shield legislation.)

This type of information seems to be particularly appropriate to the status of the discussion of newsman's privilege at present, since the point was stressed in Branzburg that First Amendment interests in confidentiality must give way to the needs of law enforcement, as exemplified by the need for testimony before grand juries. (408 U.S. 665, at 682 and 690.) Therefore, a questionnaire was developed and sent in March, 1974, to officials on the law enforcement firing line--county prosecuting attorneys and selected police chiefs--in six states, in an effort to learn whether newsman's privilege has an actual impact on the law enforcement process. The questionnaire focused on

1. opinions of whether newsmen should have privilege, and if so, how it might best be conferred;

2. whether the law enforcement officials saw newsmen as abusing confidentiality;

3. whether they (like some of the respondents in the NYLRC and Blasi studies) saw any advantage to the law enforcement process from the existence of shield laws; and

4. the respondents' personal experiences in regard to issuing of subpoenas to newsmen, and regarding voluntary cooperation with their agencies by newsmen.

The six states selected for the survey were controlled for presence or absence of a shield law: Illinois, Indiana and New Jersey all with shield laws, the latter two more than 30 years old; Wisconsin, Iowa and Missouri without shield laws. New Jersey was included despite its lack of proximity to the investigators because it is highly urbanized and, additionally, is somewhat of an anomaly among shield law states, since its courts from the 1940s have rendered very narrow interpretations for the statutory cloak of confidentiality. (See, e.g., State v. Donovan, 30 A. 2d 421, 1943; Brogan v. Passaic Daily News, 123 A. 2d 473, 1956; and Beecroft v. Point Pleasant Printing and Publishing Co. 197 A. 2d 416, 1964.) Additionally, New Jersey was the site of a well-publicized newsman's privilege case in 1972 (Bridge v. New Jersey, 295 A. 2d 3), and an attempt to broaden the coverage of its existing confidentiality statute was vetoed by the governor in 1973 on the grounds that it extended too much protection. (Shield

Laws. Lexington, Ky.: The Council of State Governments, 1973, p. 9. See also The New York Times, Mar. 20, 1973, p. 1, and Mar. 24, 1973, p. 71.) Thus, awareness of the issue was anticipated to be particularly high there; unfortunately, the small number of New Jersey respondents made the results less than definitive on that point.

Mail questionnaires were sent to all county prosecutors in these states (a total of 485), and after a follow-up mailing, returns were received during March and April, 1974, from 170, about 35%. A slightly shorter questionnaire was sent to 80 police chiefs in the six states, in communities with a newspaper of 25,000 circulation or more, and/or at least one TV station. (For the purposes of this pilot study it was decided to ignore the suburban police chiefs within the metropolitan areas of larger communities.) Again after a follow-up, responses were received from just over half of the chiefs or their delegated representatives. Because of the smaller size of the police sample, and because many of the chiefs apparently asked their subordinates to fill out the questionnaire, results from this group will be reported more sparingly than for the county prosecutors.

One caveat is in order in regard to the prosecutors' data, however. Except for New Jersey (where the response rate was slightly below the other states, and where the universe was limited to the state's 21 counties), the

majority of questionnaires went to county officials in rural areas rather than in metropolitan centers, simply because that is the nature of most counties in those five states. Some of the prosecutors responded that their experiences were not representative, since they rarely had contact with daily papers, and had very little likelihood of becoming involved in any situation involving a newsman's confidential information. Nonetheless, law enforcement goes on in rural as in urban counties, and the responses in this study are viewed as part of the total universe of American law enforcement agencies. Preliminary analysis also indicates a significant number of responses (approximately 35) from prosecutors in urbanized areas or in counties where a major university is located. All police chief responses came from urban areas. And on at least one major point--the issuance of subpoenas to newsmen--rural prosecutors were involved in greater numbers than were those from urban areas.

The responses indicated that 10 county prosecutors, including seven from county seats under 15,000 in population, and no policemen had requested issuance of a subpoena to compel a newsman to testify. (This is just under 5% of the combined responding sample of both police chiefs and prosecutors.) Of the 10 who issued subpoenas, four said that reporters actually provided information or testified; in the other cases, the request was negotiated

or dropped. (In addition to these 10 prosecutors there are such situations as the prosecutor who said he once subpoenaed "...an editor who had published a letter criticizing my handling of a case which had not come to trial, so that he could see what actually happened when the case came to court.") Interestingly, all four prosecutors who said the reporters did testify reported also that their relationships with the press were "excellent." (As an aside, press relationships were reported to be above average for virtually all prosecutors responding: 73 said they were "excellent," 64 reported they were "good," while 16 said they were "fair" and only one each admitted to "poor" or "hostile" relationships. Comparable figures for the chiefs were 16, 17, 6, 1, and 2.)

However, 66 prosecutors (38.8%) reported that reporters had at some time helped their office by volunteering information, and 25 police chiefs (59.5%) reported the same experience. Of these totals, 22 prosecutors and 12 police chiefs said that the information was confidential, while another seven prosecutors and one chief said that the information may have been confidential. Thus, 17% of the prosecutors in the survey and 31% of the police chiefs indicated that they had received confidential information from newsmen who volunteered it.

This data squares with Blasi's findings from his general sample of reporters that the "phenomenon of

cooperation with law enforcement has not been limited to reporters on specialized beats who rely on police sources." (Blasi, Press Subpoenas, p. 29. See also Kreighbaum, Hillier, Pressures on the Press. New York: Thomas Y. Crowell Co., 1973, pp. 29-30: "For decades, reporters have on occasion worked with law enforcement agencies on a voluntary basis. Swapping such information paid off in news stories for media and missing evidence for police, FBI agents, and others.") From interviews with reporters, as well as an extensive questionnaire survey, Blasi concluded that there was general "...press cooperation with the process of official fact-finding." (Ibid., p. 37.) Blasi added that in recent years, reporters have become somewhat less inclined to cooperate as freely as previously with law enforcement officials, especially at the demand of such officials. "The essential change is that newsmen are now more inclined to judge for themselves when the civic need for their information outweighs their own professional need to respect confidences." (Ibid., p. 31.)

Thus, both from this survey's responses from prosecutors and from Blasi's data from reporters, it seems that some of the conventional wisdom regarding protection of confidential sources and information by newsmen needs reexamination. However, it should be noted that all respondents may not have interpreted the question about confidential information from newsmen according to the same

definition of the term. Additionally, the question did not distinguish sharply between confidential sources and confidential information, and that might have led to some confusion. Nevertheless, these responses plus Blasi's data indicate that some newsmen are apparently cooperating voluntarily with law enforcement personnel even where confidential matters may be involved. Drug activities and consumer fraud cases were among the specific areas where reporters have provided confidential information, according to several of the prosecutors. Two of the attorneys noted that while they have received confidential information, it turned out to be insignificant. And one, perhaps typical of a larger number, noted that he has a good working relationship with the press, and "we exchange confidences frequently."

The responses showed no significant differences between shield law states and non-shield states in regard to this volunteering of information, although the percentage of prosecutors receiving such cooperation was somewhat higher in shield states. (This trend, however, was reversed for the police chiefs.) The same general situation for both prosecutors and police chiefs occurred in regard to the volunteering of confidential material between shield and non-shield states. But when the volunteering of information is analyzed in light of the prosecutors' perceived press relationships, a pattern begins

to emerge (See Table 1). And the same pattern holds for the volunteering of confidential information (also shown in Table 1). The better the press relationships, the more

TABLE 1

Prosecutors' Receipt of Information and Press Relationships

	Had Information Volunteered	No Information Volunteered	Confidential Information Volunteered
Excellent press relationships	36 (57.1%)	30 (36.6%)	19 (65.2%)
Good press relationships	25 (39.7%)	37 (45.1%)	8 (27.6%)
Fair or worse press relationships	2 (3.2%)	15 (18.3%)	2 (6.9%)
Totals	63 (100%)	82 (100%)	29 (100%)

(Don't Know" and "Not Ascertained" responses are ignored here; they totalled 25 out of 170 responses to these questions.)

These figures are significant at the .005 level for the Information Volunteered-No Information Volunteered section of the Table.

likely that a prosecutor will have received both information of any kind and confidential information of some sort from a journalist. (The cell sizes for police chiefs' responses to these questions were too small to be valid for analysis.) This possibility of informal cooperation is one which deserves further study, although the data here showed no relationships between press

relationships and (1) whether a prosecutor had requested a subpoena for a newsman; (2) whether a prosecutor thought that newsmen's refusal to reveal sources or information had hampered the apprehension or prosecution of criminals; (3) prosecutors' preferences with regard to protection or no protection for confidentiality.

Only 12 of 170 prosecutors said they thought there had been cases of newsmen claiming confidentiality when this shouldn't have been done, though a number expressed suspicion that this might happen; one police chief reported such an incident in his state, though over half (54.8%) said they simply didn't know of any such situations. Similarly, no police chiefs said that refusal to reveal sources had hampered apprehension or prosecution of criminals, though almost half (45.2%) of them put themselves in the "don't know" category. For prosecutors, only 7.5% thought there had been such interference, and about one-third said they didn't know.

In his survey, Blasi interviewed some prosecutors who "said they thought on the whole the privilege helped them...," especially in regard to voluntary cooperation with good investigative reporters. (Senate Hearings, p. 138.) This survey went one step further and asked if the existence of a shield law had been helpful to law enforcement agencies. None of the 170 attorneys responding knew of any such situation. However, four police

chiefs indicated knowledge of such situations.

Among the attorneys in the three shield states, there was considerable confusion over whether or not their state did in fact have a shield law on the books. This, perhaps, is more excusable in Illinois, where the shield law was passed in 1971, than in the other two states, where the laws have been on the books for more than 30 years. The figures bore this out: of the Illinois prosecutors answering this question, 84.5% (22 of 26) either did not know whether the state had a shield statute or said incorrectly that it did not. For the other two states, the percentage was slightly better: 27 of the 42 prosecutors responding to this question (64.3%) either said their states lacked a shield law or said they didn't know. Overall, the confusion over whether or not there was state shield legislation on the books was far greater in the three shield law states than in the three others (see Table 2). One possible conclusion from these figures is that the vast majority of prosecutors in the shield states have not been sufficiently troubled in their work by the existence of shield legislation to pin down in their own minds whether or not such legislation exists. Even in the two states with long-standing laws, almost two-thirds of the county prosecutors were unable to answer correctly a question about the existence of such legislation.

TABLE 2

Prosecutors' Knowledge of Shield Legislation

	Right	Wrong	Don't Know	Totals
3 Shield Law States	17 (26.6%)	27 (42.2%)	20 (31.2%)	64 (100%)
3 Non-Shield States	76 (85.4%)	2 (2.2%)	11 (12.4%)	89 (100%)

Note: "Not Ascertained" responses have been dropped from this Table.

For the police respondents, the percentages were comparable. Of the 24 respondents in the three shield states, only 25 per cent knew their state had such a statute. The police respondents in the non-shield states were not as knowledgeable as their prosecutor counterparts: two-thirds of them knew that their state had no shield law, but this was appreciably below the percentage for prosecutors in those states.

Of the 170 attorneys responding, 80 (47.1%) favored at least qualified protection for newsmen's confidential materials in some situations. By a small margin, respondents from shield states were more favorable to some form of protection for confidentiality than were respondents from the non-shield states (52.8% to 44.8%). But there was a great lack of unanimity as to how best to provide such protection (see Table 3). Note, however, that the largest preferred category was reliance on the

First Amendment, by one-and-one-half times as many respondents as any other method of protection (see last column of Table 3). These responses, however, did not specify the details of First Amendment protection.

TABLE 3

Methods of Partial Protection for Confidentiality Favored by Prosecutors

	Prosecutors Favoring Qualified Protection	Prosecutors Favoring All-But Libel Protection	Totals*
National Shield Law	12 (24.5%)	7 (25.0*)	21 (12.4%)*
Minimum Nat'l Standard (States Could Exceed)	10 (20.4%)	9 (32.1%)	21 (12.4%)*
Diversity of State Shield Laws	13 (26.5%)	4 (14.3%)	19 (11.2%)*
First Amendment	14 (28.6%)	8 (28.6%)	31 (18.2%)*
Totals	49 (100%)	28 (100%)	92 (54.2%)*

*The "Totals" column includes respondents who initially indicated either no opinion, or opposition to legal protection for newsmen's confidentiality, but nevertheless on a later question indicated a preference for one kind of protection for journalists. The "First Amendment" category in the "Totals" column also includes the two respondents who favored an absolute privilege, and three respondents who indicated an "Other" preference on the general question of confidentiality and a later preference for a First Amendment approach. Percentages in the "Totals" column are expressed in relation to the total sample of prosecutors (N=170).

A somewhat similar diversity manifested itself among those respondents who favored protection for newsmen in all situations except where their medium was a party to a libel suit, although the smaller number of respondents makes it more difficult to generalize from the latter figures. But note that nearly half of the prosecutors--a total of 80 of the 170--favored some form of protection for newsmen's confidentiality on one measure (including two respondents who favored an absolute privilege), and over half (92, or 54.2%) indicated on another measure a preference for one of the four alternatives offered as ways to protect confidentiality (see last column of Table 3).

Of the attorneys, 70 (41.2%) favored protection for newspaper reporters' confidential material. Other categories ranking high among those recommended for such protection were radio and television newsmen (noted by 37.6% of the attorneys), magazine newsmen and writers (35.3%), and wire service or press association newsmen (31.8%). At the bottom end of the list were occasional pamphleteers (11.8%) and former journalists (8.2%), the latter a potentially troublesome situation in light of the Farr case. Among the police chiefs, the top four categories favored for protection of confidential material were the same, with one change in order. The bottom two categories were also the same, although in reverse order (see Table 4).

TABLE 4

Journalist Categories Favored for Protection of Confidentiality

Category	Prosecutors in Favor		Police Chiefs in Favor	
	Number	%*	Number	%*
Newspapers Reporters	70	41.2%	18	42.9%
Radio-TV Newsmen	64	37.6	17	40.5
Magazine Newsmen & Writers	60	35.3	13	31.0
Wire Service of Press Association Newsmen	54	31.8	16	38.1
Photographers, TV Cameramen	38	22.4	12	28.6
Foreign Language Newspaper Reporters	36	21.2	11	26.2
Campus Newspaper Reporters	36	21.2	9	21.4
Freelance or Part-Time Writers or Photographers	33	19.4	7	16.7
Other Alternative Media Reporters	33	19.4	8	19.0
Book Authors	28	16.5	6	14.3
Newsman for Labor Union or Specialized Media	27	15.9	7	16.7
Occasional Pamphleteers	20	11.8	4	9.5
Former Journalists	14	8.2	5	11.9

*Percentages are given as a fraction of the total N for each category of respondent (prosecuting attorneys=170; police chiefs=42).

Among the attorneys, 69 (40.6%) checked off at least two or more groups of journalists who should, in their opinion, have protection for confidential sources or material. But on the other side of that same issue, only 40 of the prosecutors checked off two o. fewer groups which should be granted the power to subpoena journalists for their confidential sources or information. By contrast, 104 prosecutors (61.9%) either checked off five or more such

groups or agencies, or otherwise indicated their belief that no such protection should be given to journalists. The group most favored for such subpoena power was the grand jury, followed considerably by trial judges, and the prosecution in any criminal trial. Ranking lowest for this power were parties in a civil suit and administrative agencies (see Table 5; this question was not asked of police chiefs, so no comparable figures are available).

TABLE 5

Prosecutors' Preferences Concerning Subpoena Powers

Category	Prosecutors in Favor		Prosecutors Opposed	
	Number	%*	Number	%*
Grand Juries	145	85.3%	25	14.7%
Trial Judges	119	70.0	51	30.0
Prosecution in Any Criminal Case	117	68.8	53	31.2
Defense in Any Criminal Case	110	64.7	60	35.3
Defense in Major Felony Trials	106	62.4	64	37.6
Prosecution in Major Felony Trials	106	62.4	64	37.6
Law Enforcement Agencies	104	61.2	66	38.8
Legislative Bodies	100	58.8	70	41.2
Parties in a Civil Suit	93	54.7	77	45.3
Administrative Agencies	82	48.2	88	51.8

*Percentages are given as a fraction of the total (N=170) of prosecutors responding to the survey; of this trial, 69 (40.6%) indicated opposition to newsman's privilege in all forms, and were therefore directed not to respond to this series of questions. The remaining 101 respondents checked off those groups for which they favored the power to subpoena newsmen for their confidential sources and information; the figures in the "Prosecutors Opposed" column in this table indicate those prosecutors responding to this series of questions who did not check off that particular category.

Finally, of the prosecutors who favored some form of confidentiality, over half (41 of 75) have received information from newsmen at one time or another. But of those who do not favor confidentiality, only 29.9% (23 of 77) have received such cooperation from newsmen (significant beyond the .01 level). What perhaps emerges here, in combination with the earlier figures on press relationships and the volunteering of information, is that good newsman-source relationships seem to work both ways, when the sources are county attorneys. Good source relationships provide the conditions under which newsmen will more frequently cooperate with a prosecutor by volunteering information--even confidential information. And, on the other hand, such cooperation is apparently a factor in the attitudes of prosecutors toward newsman's confidentiality. The only problem posed by these data, as noted earlier, is the lack of <u>any</u> impact between <u>press relationships</u> and favoring of confidentiality--a relationship that logically <u>should</u> hold up as the third leg of the triangular relationship involving press relations-information receipt-attitude on confidentiality.

But the major--albeit tentative--conclusion to be drawn from these figures is that the problem of newsman's confidentiality is not seen as overwhelming by the vast majority of county prosecutors. Admittedly, it can cause difficulties in individual instances. But the number of

times that problems arise is apparently quite small--here, only 7.5% of the prosecutors indicated that the refusal of a newsman to disclose confidential material had hampered apprehension or prosecution of criminals. And, obviously, even for that 7.5%, such problems are not everyday occurrences. Most prosecutors, perhaps, might agree with the comment of one respondent who was struggling with criteria for a qualified privilege, and remarked: "...at some point, (and) I am not sure how we define it, the public welfare and protection must take precedence." Newsmen would probably agree with this position, though the point might well be defined differently. But this kind of approach to the problem represents a desire to accommodate conflicting values, rather than an absolutist position at either end of the spectrum.

The fact that a majority of prosecutors in shield law states did not know of the existence of shield statutes lends further credence to the conclusion that confidentiality does not cause frequent problems for prosecutors. As one attorney phrased it, consideration of the issuance of a subpoena for a newsman would be "an extreme rarity." He added: "Our 'news gathering' is done by police investigators. They are the ones who put together a criminal case--not the newsman!!"

IV. CONCLUSIONS

What can be said with certainty about newsman's privilege in mid-1974, if state shield laws don't always protect newsmen in those states, and if the Branzburg decision is used to grant as well as to deny newsman's privilege?

It appears that there is little First Amendment protection for confidentiality before properly functioning grand juries, and only slightly more in criminal trial proceedings, though the latter has not been tested fully. In civil proceedings, although the situation is quite unclear, the balance has perhaps weighed slightly in favor of journalistic privilege, in the post-Branzburg cases.

Some sources appear to have dried up, but newsmen still seem determined to get below the surface of the news and provide what they consider to be necessary information and background to the public. Even the very real threat of jail terms has not convinced newsmen to violate confidentiality upon legislative or judicial command. In the cases noted here, only David Lightman and Stewart Dan acceded to such demands, and according to this author's research, they were only the fifth and sixth newsmen in 125 years to do so. Nor have newsmen insisted on protecting their confidential sources or information in every possible situation, as indicated by the cooperation with

law enforcement officials reported in the pilot survey data above. Additional confirmation of this comes from such incidents as the testimony of a Chicago reporter regarding a policeman, accused of murder, with whom he apparently had a confidential relationship. (Chicago Tribune, July 10, 1973, Sec. 2, p. 1.) This is also borne out by a federal official who said this year that since the issuance of the Attorney General's guidelines covering subpoenas to newsmen in 1970, only 28 subpoenas have been issued at the request of federal prosecutors, and 26 of these were requested by the newsmen involved, who were willing to testify but preferred to do so only after a subpoena was issued. In only two of the 28 cases was there a confrontation with the newsman. Prior to the guidelines, the Justice Department was issuing about a dozen subpoenas a month, and confrontations were not uncommon -- for example, the Caldwell case. (John W. Hushen, Public Information Director, U.S. Department of Justice, statements at the conference on "Media and the First Amendment, 1974," Michigan State University, East Lansing, Michigan, May 3, 1974. For a recent version of the guidelines, see 38 Federal Register 29588, October 26, 1973.)

The effect of the guidelines is borne out by recent privilege cases. Two-thirds of the dozen reported cases since Branzburg originated on the state level, involving

both grand juries and trial proceedings. Six of those 12 cases also arose in shield law states, indicating that the courts have not been totally willing to follow legislative directions, or that the directions are ambiguous. But this may not be a crucial distinction, because the courts seem to be moving toward the same general guidelines whether shield laws govern or not.

Those guidelines appear to be that the First Amendment must be balanced against the competing needs of the judicial system; that grand jury and other criminal proceedings are to weigh more heavily in the balance than civil proceedings (unless, perhaps, the news medium is a party to a civil suit); that newsmen who actually witness a felony are much more likely to be required to testify, regardless of confidentiality; and that situations where a newsman's testimony is needed to prevent a miscarriage of justice, or serve some overriding societal interest, will weigh heavily against protection for the First Amendment. But, conversely, information which is not essential to a proceeding, or which can be obtained from alternative sources, probably will not outweigh First Amendment claims in any situation. Additionally, the perception by the courts of a traditional type of confidential newsman-source relationship is likely to strengthen claims of confidentiality.

The question has been asked whether there really is

any need for formal legal protection of confidentiality. The Watergate example can be used both ways in such an argument: while it is true that confidential sources were crucial to the media reports on Watergate, it is also true that most of those sources made their information available in the absence of any formal legal protection for their anonymity. But that, perhaps, is the crux of the issue: no one -- neither newsmen, nor sources, nor the public -- can be sure of the extent to which confidentiality is protected, in shield states or elsewhere. That uncertainty, plus a general reluctance by prosecutors and courts to jail newsmen indefinitely while still punishing them for contempt, leaves the journalist in the middle of this complex issue. Continued uncertainty over where the precise balance should be struck requires the newsman to shoulder the burden of resolving this complex relationship between the needs for an orderly judicial process and a generally free flow of information to the public.

But even people who agree that the uncertainty must be resolved have wide differences of opinion on how to do so, as the testimony in the most recent Congressional hearings proves amply. What seems to be needed, especially in view of the survey data reported above on the actual seriousness of the newsman's privilege issue, is a refocusing of the question, to zero in on the relatively small number of situations where confidentiality and the law

enforcement/judicial processes really come into conflict. The need for such a reappraisal is evident when you add the survey data to the inconsistent pattern of recent newsman's privilege decisions. On one hand, some courts have upheld privilege recently on such grounds as contentions that the material sought is (1) available from other sources; and/or (2) not crucial to the proceeding; and/or (3) not part of an issue of overriding social importance. But, by contrast, in at least two cases (Forest Hills and McGowan), individual newsmen have been excused from testifying, but the courts indicated that no general newsman's privilege was established by these decisions. Other courts, most notably in Branzburg, ordered individual newsmen to testify.

Above all, a reappraisal is needed because of the small number of situations where a major conflict exists between the media and the judiciary. Both the news media and the judicial system need to look at this issue in a new frame of reference and to work toward some accommodation that does not produce broad scale problems in an effort to resolve a small (albeit highly sensitive) percentage of cases.

Recent developments indicate that many people in both fields are already doing so. But to those for whom First Amendment values have always outweighed the law enforcement or judicial processes, the issue should be

seen not only in terms of the possible stories which might be "chilled" by a constriction of confidentiality. To those whose values have run in the opposite direction, the problem should be seen in broader terms than just potential investigations or trials which might be hampered by a newsman's insistence on protecting confidential sources or information. The issue should also be viewed, by everyone concerned, in terms of the relatively small number of actual confrontations between media and judicial system, and the widely differing circumstances from which they arise. The facts of the dispute, rather than rhetoric, emotion or habit, should shape the context for developing a consistent pattern of response, to benefit society as a whole. The very diversity of newsman's privilege decisions since Branzburg may indicate that both sets of values are so important to society that simplistic answers will not work.

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